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No. 92-911

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-311

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. This case presents a single, straightforward question: Whether respondent's application for attorney's fees under the Equal Access to Justice Act (EAJA) was timely. As we explain in the certiorari petition (at 9-16) and at pages 6-10, *infra*, it was not. Under the unambiguous terms of EAJA and 42 U.S.C. 405(g), as well as this Court's decisions in *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2165 (1991), respondent was required to file his fee application within 30 days of when the district court's April 5, 1989, remand order was no longer appealable. Respondent missed that deadline by more than a year.

The Eighth Circuit's contrary ruling plainly warrants review by this Court. Respondent concedes (Br. in Opp. 4)

that the decision below conflicts with *Luna* v. *United States Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991). He also concedes (Br. in Opp. 5) that the question of when an EAJA application must be filed in a Social Security case remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g) is a broadly recurring one, because several thousand cases are remanded to the Secretary each year. See Pet. 18 & n.12. Indeed, since *Melkonyan* was decided, that issue has been decided by four courts of appeals and is pending in at least three others,[1] and we have filed another certiorari petition presenting the same issue. *Sullivan* v. *Gutierrez*, petition for cert. pending, No. 92-361. This is a textbook example of a case that warrants certiorari.

2.a. Respondent nevertheless goes to great lengths to oppose certiorari. He first contends (Br. in Opp. 4-6) that the circuit conflict is "tolerable" because it concerns only attorney's fees (not substantive entitlement to benefits), and because litigants can simply follow whichever one of the disparate filing rules that governs in the circuit where their cases arise. But this Court frequently grants review on attorney's fee issues, as it did in *Melkonyan* and *Sullivan* v. *Hudson*, 490 U.S. 877 (1989). In fact, the Court granted review in *Melkonyan* despite the absence of a circuit conflict. Moreover, respondent's position that the circuit conflict is not worthy of resolution by this Court because litigants can simply follow circuit precedent would effectively bar review of *any* procedural issue.

[1] In addition to the decisions of the Fifth Circuit in *Luna* and the Eighth Circuit in this case, *Welter* v. *Sullivan*, 941 F.2d 674 (1991), and *Hafner* v. *Sullivan*, 972 F.2d 249 (1992), the First and Tenth Circuits have rendered decisions that agree with the result reached by the Eighth Circuit in this case. See *Labrie* v. *Secretary of HHS*, No. 92-1066 (1st Cir. Sept. 30, 1992); *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992), petition for cert. pending, No. 92-361. The issue remains pending in the Sixth, Ninth and Eleventh Circuits. See *Iker* v. *Sullivan*, No. 92-5233 (6th Cir.); *Engelbrite* v. *Secretary of HHS*, No. 91-16920 (9th Cir.); *Newsome* v. *Sullivan*, No. 91-8917 (11th Cir.).

Congress has enacted a statute that imposes a single, nationwide limitation on the filing of EAJA applications, but the uniform scheme Congress designed cannot be restored absent review by this Court.[2]

b. Respondent also contends (Br. in Opp. 6-9) that certiorari should be denied because this case requires resolution of issues in addition to when an EAJA application must be filed following a sentence four remand. Even if respondent were correct that other issues are necessarily presented, that would scarcely support *denial* of the petition. Logically, it should lead the Court to grant review and consider those additional issues as well. In any event, respondent's premise is incorrect.

(i) Respondent argues (Br. in Opp. 7) that if the Court were to grant review, "it would have to deal comprehensively with the difficulties engendered by this Court's decisions in *Finkelstein* and *Hudson*, as well as *Melkonyan*." Specifically, he asserts (Br. in Opp. 7) that "the Court would need to determine not only when a sentence-four fee application should be filed, but whether a claimant is a prevailing party entitled to fees by virtue of obtaining a sentence-four remand alone," and would "also need to determine whether the rule in *Hudson*—that work done in post-remand administrative proceedings are compensable

[2] Respondent notes (Br. in Opp. 6 & n.1) that many other attorney's fee statutes do not contain filing deadlines and that district courts have adopted local rules imposing various time limits for filing applications under those statutes. See *White* v. *New Hampshire*, 455 U.S. 445, 454 (1982). Respondent suggests that the solution to the problem presented by the conflicting judicial rulings at issue here is the same as the solution under those other statutes: "unless and until Congress acts to provide uniformity, lawyers will consult the appropriate rule and file their fee applications accordingly." See Br. in Opp. 6. Respondent, of course, ignores the fact that Congress *has* "act[ed] to provide uniformity" under EAJA. The courts of appeals are divided on what that uniform rule is, and they have no authority to fashion filing rules at variance with the statute. See 28 U.S.C. 2071(a), 2072(b).

under the EAJA—applies in sentence-four cases." Respondent is wrong. The Court need not resolve either of those issues, much less "deal comprehensively" with the entire range of potential EAJA issues in this context.

The question whether a claimant may be regarded as a "prevailing party" solely by virtue of obtaining a remand pursuant to sentence four, as respondent urges if the EAJA filing period commences at that point (see Br. in Opp. 15-18)—or whether a claimant instead becomes a "prevailing party" only after benefits are awarded on remand, as this Court and the courts of appeals have heretofore concluded (see Pet. 15-16)—simply does not arise in this case. Whatever the correct answer to that question, respondent's application must be denied because he failed to satisfy the *threshold* requirement that he file his application within 30 days of when the remand order was no longer appealable. Similarly, no issue was raised in the court of appeals as to whether respondent could properly be awarded fees under *Hudson* for services his attorney rendered in the administrative proceedings on remand; accordingly, the question whether such fees can ever be awarded in a case involving a sentence-four remand is not before the Court. In addition, there is no circuit conflict on the prevailing-party and *Hudson*-fee issues that requires resolution by this Court.

(ii) Respondent further argues (Br. in Opp. 7-8, 18-23) that this case will present retroactivity issues if the Court grants review and holds that a sentence-four remand triggers the EAJA filing period. Respondent argues that such an interpretation should not be applied retroactively, but that if it is, equitable tolling of the 30-day limit should then be addressed as well. However, respondent did not make those arguments in the court of appeals,[3]

[3] Amicus Mid-Minnesota Legal Assistance did make those arguments below (C.A. Br. 5-16), but respondent did not join in them.

and there accordingly is no reason why this Court should consider them. Moreover, the retroactivity and tolling issues, like the other issues respondent belatedly raises, have generated no circuit conflict that would warrant review by this Court.[4]

Nor do those issues have any substantial continuing importance. The only claimants who would have even a colorable argument in support of nonretroactivity or tolling would be those whose cases were remanded *prior* to *Melkonyan*, which expressly stated that an EAJA application must be filed within 30 days of when a sentence-four remand becomes final and not appealable. 111 S. Ct. at 2165. The number of such claimants will diminish rapidly in the near future, because it has now been more than sixteen months since *Melkonyan* was decided. For the foregoing reasons, if the Court believes that the nonretroactivity and tolling issues might remain open in this case despite respondent's failure to raise them below, the Court should remand the case to the court of appeals to consider those issues in the first instance. Compare *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 297-298 (1987).[5]

[4] Respondent cites only one court of appeals decision declining to apply *Melkonyan* retroactively—the unpublished decision in *Sargent* v. *Sullivan*, 941 F.2d 1207 (4th Cir. 1991) (Table). Similarly, in addition to the Fifth Circuit's decision in *Luna*, respondent cites only a smattering of district court decisions on the equitable tolling issue in this context. See Br. in Opp. 22-23 & n.12.

[5] Respondent's broad nonretroactivity argument is without merit in any event. The rule that an EAJA application must be filed within 30 days of when a sentence-four remand is no longer appealable was expressly stated in *Melkonyan* and was foreshadowed by *Finkelstein*, which held such a remand appealable. There accordingly is no merit to respondent's contention that any reiteration of that rule should be given purely prospective effect from the date of the Court's decision in the *instant* case. In addition, retroactivity is "overwhelming the norm." *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2443 (1991)

c. Finally, respondent urges (Br. in Opp. 9) the Court to deny review because Congress could resolve the issue by amending EAJA. That is not a basis for denying review. Congress has the power to resolve any of the numerous questions of statutory construction that this Court chooses to consider each Term. Although the Administrative Conference of the United States has recommended that the EAJA filing period be repealed or begin to run only after proceedings on remand have been completed, see *ibid.* (citing 57 Fed. Reg. 30,101, 30,109 (1992)), it is pure speculation whether Congress will even consider (much less enact) any such amendment in the foreseeable future. This Court, however, can and should promptly resolve the timeliness issue, and thereby put an end to the widespread litigation on that issue in the lower courts.

3. Respondent's limited attempt to defend the Eighth Circuit's timeliness ruling on the merits (Br. in Opp. 10-12) is unavailing. Conspicuously absent from his discussion is any analysis of the controlling statutory text. EAJA requires that a fee application be filed "within thirty days of final judgment in the action," and "final judgment" is defined to mean "a judgment that is final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). Sen-

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(opinion of Souter, J.); see also *id.* at 2449-2450 (opinion of Blackmun, J.) (retroactivity required in all cases); *id.* at 2450-2451 (opinion of Scalia, J.) (same). Here, that result is required by the jurisdictional nature of EAJA's 30-day filing period, because "a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). See Gov't C.A. Br. 14-16; Gov't C.A. Reply Br. 8-18. Finally, prospective application of the rule we urge is not required to further the purpose of EAJA (cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971)), which is to remove the deterrent to challenging government action that results from the inability to retain counsel. See *Hudson*, 490 U.S. at 883. Respondent and other claimants who might be affected by the Court's enforcement of the 30-day filing requirement in this case have, by definition, *not* been deterred from retaining an attorney or from challenging the Secretary's decision denying benefits.

tence four of 42 U.S.C. 405(g) provides that a court "shall have power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." Thus, a remand order under sentence four is ancillary to and must be entered "in conjunction with" a "judgment" affirming, modifying, or reversing the Secretary's decision. *Melkonyan*, 111 S. Ct. at 2164, 2165. Sentence eight of Section 405(g) in turn provides that such a judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions" (emphasis added). In light of this explicit text of 42 U.S.C. 405(g), the Court held in *Finkelstein* that an order entered pursuant to sentence four is a "final judgment" that may be appealed pursuant to 28 U.S.C. 1291, even if it includes a remand to the Secretary. 496 U.S. at 625, 629.

In this case, respondent does not and could not dispute that the district court's April 5, 1989, order was entered pursuant to sentence four of 42 U.S.C. 405(g), and therefore was appealable: that order expressly "reversed" the Secretary's decision and remanded to the Secretary for further proceedings. Pet. App. 26a-27a. It follows that the 30-day period within which respondent was required to file his EAJA application began to run after the 60-day period for appealing the April 5, 1989, order expired, which was on June 4, 1989. Respondent's EAJA application, which was filed on July 17, 1990, was more than a year out of time.

Respondent seeks to avoid that result by asserting (Br. in Opp. 10) that "the district court's sentence-four *remand* did not constitute the sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment thereafter." There is no indication that the district court actually intended to retain jurisdiction after the remand; its docket sheet shows that the case was closed. The Eighth Circuit instead has held that a district court automatically retains jurisdiction to enter a post-

remand judgment in *any* sentence-four case that is remanded for further proceedings, rather than merely for payment of benefits. See *Hafner*, 972 F.2d at 252.

Nothing in sentence four of 42 U.S.C. 405(g) or EAJA permits a district court to evade the finality of a judgment that contains a remand order—and prevent commencement of EAJA's 30-day filing period—by remanding to the Secretary under sentence four in some manner *other* than by entry of a "judgment," while retaining jurisdiction to enter a judgment after proceedings on remand have been completed. As this Court explained in *Finkelstein*, Section 405(g) contemplates a post-remand filing with the court and entry of a post-remand judgment only in cases remanded pursuant to sentence six of that Section. See 496 U.S. at 626-627. Moreover, *Finkelstein* specifically rejected the notion that a district court has the option to remand a case pursuant to sentence four without entering a judgment. See 496 U.S. at 629 (quoted at Pet. 13).[6]

In arguing otherwise, respondent relies entirely on the discussion in *Hudson* concerning the authority of a district court under 42 U.S.C. 405(g) to retain jurisdiction

[6] Respondent also errs in relying (Br. in Opp. 10, 12) on the requirement in Fed. R. Civ. P. 58 that a judgment be set forth on a separate document. Respondent did not argue below that the district court's April 5, 1989, order was not an appealable judgment because no separate document was issued at the time, and he therefore has waived that argument. Indeed, he waived that argument at least by the time he participated in the administrative proceedings contemplated by the remand order without insisting upon issuance of a separate document. Cf. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978). In any event, a failure to comply with Rule 58 neither renders a judgment non-final nor deprives an appellate court of jurisdiction. *Bankers Trust*, 435 U.S. at 386 & n.7. Accordingly, and contrary to respondent's apparent view, Rule 58 does not grant a district court power to set aside the Secretary's decision and order a remand pursuant to sentence four, but to insulate that remand from appellate review and prevent commencement of the EAJA filing period by withholding the formality of setting forth its judgment in a separate document.

and enter a post-remand judgment. See Br. in Opp. 10-12. *Hudson*, however, did not distinguish between different kinds of remands. See 490 U.S. at 884-888. This Court subsequently made clear in *Finkelstein* that the statutory provisions on which *Hudson* relied in discussing the retention of jurisdiction and post-remand filings and judgments are confined to sentence-six remands, 496 U.S. at 626-627, and the Court specifically declined to follow the language in *Hudson* that might have suggested that a sentence-four remand order is not a final judgment, *id.* at 629-631.

Similarly, in *Melkonyan*, the Court stated that there is only a "narrow class" of administrative proceedings that may be considered so intimately connected with the judicial proceedings as to be part of the "civil action" for purposes of an award of fees under EAJA, and it defined that class to consist of only those cases in which " 'a formal complaint within the jurisdiction of a court of law' *remains pending and depends for its resolution upon the outcome of the administrative proceedings*." 111 S. Ct. at 2162 (quoting *Hudson*, 490 U.S. at 892). In cases remanded pursuant to sentence four, the complaint challenging the Secretary's decision denying benefits does not "remain pending" or "depend[] for its resolution upon the outcome of the administrative proceedings." To the contrary, the district court must enter a final judgment that disposes of the case (by reversing or modifying the Secretary's decision and remanding to the Secretary for further proceedings), and the Secretary's new decision on remand then "will be reviewable by a separate piece of litigation." *Finkelstein*, 496 U.S. at 625.[7] Consistent with

[7] The Court further stated in *Melkonyan* that *Hudson* "stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative

this statutory scheme, the Court made clear in *Melkonyan* that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Respondent's reliance on *Hudson* in support of the quite different rule adopted by the Eighth Circuit is thus foreclosed by both *Finkelstein* and *Melkonyan*.[8]

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be summarily reversed.

KENNETH W. STARR
Solicitor General

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level." 111 S. Ct. at 2162. *Finkelstein* makes clear that a district court has that authority only in cases remanded pursuant to sentence six.

[8] In light of the discussion in the text, respondent exaggerates considerably in asserting (Br. in Opp. 11) that *Finkelstein* and *Melkonyan* "specifically reaffirmed" *Hudson*. Both decisions pointedly limited the very implications of the *Hudson* opinion on which respondent relies here. As respondent points out (Br. in Opp. 10), it appears that if the Court in *Hudson* had focused upon the distinction between sentence-four and sentence-six remands that was subsequently identified in *Finkelstein* and *Melkonyan*, the remand order in *Hudson* itself would probably have been classified as a sentence-four remand. But *Hudson* did not draw any such distinction, and it therefore does not—in the wake of *Finkelstein* and *Melkonyan*—stand for the proposition that a district court may retain jurisdiction and enter a post-remand judgment (which in turn would trigger the EAJA filing period) in those cases that are remanded pursuant to sentence four. The reasoning of the latter two decisions therefore limits *Hudson* to sentence-six cases.